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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 22 2004

SRC 01 030 52346

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an export and import firm. It seeks to employ the beneficiary permanently in the United States as the director of international operations. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 6, 2000. The beneficiary's salary as stated on the labor certification is $55,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The manifold request for evidence (RFE), dated July 17, 2001, required the following additional evidence. The RFE exacted the job duties and titles of two employees (SK and GS) of the employer and Wage and Tax Statements for 1999 (Forms W-2), as evidence of salaries paid, to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The RFE, further, prescribed an explanation of how the beneficiary, who is the President and an incorporator of the petitioner, could report to the petitioning employer's Vice-President (MC). The RFE, especially, questioned why the Employer's Quarterly Federal Tax Return (Form 941) did not show MC as an employee and why the federal tax return did not reflect any salary paid to MC, as an officer.

The RFE concluded with a request for the beneficiary's most recent application for H-1 status (I-129). It entailed advice as to why the petitioning corporation paid no wages to the beneficiary as an employee when she and her family were in H status.

The response to the RFE described SK and GS, respectively, as an administrative assistant and an administrator. The petitioner's 1999 Form W-2 reported $46,300 paid to the beneficiary. Its 1999 Form 1120, U.S. Corporation Income Tax Return, reflected taxable income before net operating loss deduction and special deductions of $4,261. Schedule L of the 1999 federal tax return, significantly, showed net current assets of $14,072, the difference of current assets minus current liabilities. W-2 wages paid to the beneficiary ($46,300) plus net current assets ($14,072) equal $60,372, an amount equal to, or greater than the proffered wage.

In other respects, counsel's response, in a transmittal letter dated October 5, 2001 (RFE-TRM), had little evidentiary value. Counsel explained that:

> You are incorrect in your assumption that the Beneficiary was not paid as an employee while in the US under H status. Quite the contrary is the case. What may have occurred is that you may have not noticed that for certain years, the CPAs of [the petitioner] allocated [the beneficiary's] salary between "employee salary" and "officer salary." Nonetheless, we are submitting evidence of her continued employment and salary payments while under H status.

The RFE-TRM listed, but, as the record is presently constituted, did not include, 1998 Forms W-2, 1998 Forms 941, a CPA opinion, or a CPA allocation. Though presumably available, and clearly pertinent to the ongoing ability to pay the proffered wage, the RFE-TRM neither listed nor included 2000 Forms W-2 of the beneficiary, the petitioner's 2000 federal tax returns, or any other financial document. *See* 8 C.F.R. § 204.5(g)(2). The petitioner does not assert any wages paid to the beneficiary in 2000, and counsel documents that the beneficiary's M-2 status after April 10, 2000 precluded her employment.

In the RFE-TRM, counsel testified on other matters, largely absent documentation in the record, as to the function of the beneficiary as President and an incorporator of the petitioner, that:

> Any way [sic], in Florida, as in the rest of the country, the president of a corporation serves at the discretion of the Board of Directors and Shareholders. [The beneficiary] never was a member of the Board of Directors nor a shareholder of the corporation. Moreover, the fact the Beneficiary at a certain time appeared as the incorporator of the corporation also is irrelevant.
>
> [MC], the prior president, vice-president and shareholder of the Corporation, knew and was aware of the Beneficiary's business ability and acumen as a result of prior business transactions. . . . Thus, as a result of her travels, [MC] delegated certain duties such as the incorporation of the business to know and trusted business colleagues.
>
> [MC's] family commenced the business of [the petitioner] having identified a potentially successful market nitch [sic]. [MC's] family has invested in these businesses [sic] before [sic] and instead of earning salaries as a result of their participation in the [sic] business, they have banked upon the appreciation of the business. Again, this had a positive result for them. Late last year the owners of the [petitioner] sold the business to the owners of a competitor for a substantial sum.

The director noted the absence of evidence concerning terms of the sale of the petitioner to a competitor, questioned the job offer from only the petitioning corporation (predecessor), and criticized the absence of information on the changed structure or financial documents of the competitor (successor). The director considered that the beneficiary's H status was precisely the reason that CIS might expect the payment of wages to her in 1998. The petitioner, inexplicably, listed, but did not tender, 1998 financial documents or offer any account for their omission .

Moreover, the director determined that the 1999 sum of $46,300 paid to the beneficiary and $4,261, the petitioner's taxable income before net operating loss deduction and special deductions, being $50,561, was less than the proffered wage and did not establish that the petitioner had the ability to pay the proffered wage. The director denied the petition on February 21, 2002.

On appeal, counsel pleads, both, that the decision fails to set forth clearly the legal and factual basis for the denial, and that the denial was incorrect as to the petitioner's ability to pay the proffered wage.

Counsel testifies in the appeal brief, dated March 23, 2002, that:

> The Cittadino family sold a portion of its interest in Petitioner in 2000. The legal status of the petition DID NOT CHANGE. A sale of a corporation's shares in and of itself does not result in any change to the legal status of the entity.

The absence, in these proceedings, of any documentation of the sale of shares or interests is, indeed, puzzling, but the fault lies directly with the petitioner's evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The RFE notified the petitioner to produce evidence of the payment of, or the ability to pay, the proffered wage to the beneficiary and to state an explanation of the anomaly of the corporate structure by which the beneficiary, as President, reported to the Vice-President. The unresponsive allegation, without evidence, said that unnamed owners had purchased the petitioning corporation, or, perhaps, merely bought some shares and changed the board of directors. The confusion has arisen from the introduction of this contradiction without any support or resolution. Cases cited by counsel concern the administrative agency's interpretation of the evidence, rather than the unsupported allegations of a party.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Counsel's averments, as noted above, contradict each other. Counsel baldly claims, in the RFE/TRM, that the petitioner's entire business was sold for a substantial sum pursuant to a plan that the Cittadinos had used in many businesses. Now, the brief on appeal testifies that not much really changed, in that:

> [CIS] can not deny the instant petition on the premise that such a sale, *could have* resulted in a change to the legal status of the corporation. Neither the business operations or objectives of the corporate entity changed. The only result of the sale was a change in the composition of the shareholders and certain officers. The Cittadinos remained on the Board of Directors. That sale of the shares of the corporation' [sic] stock does not constitute grounds for denial of the petition. Naturally, as an infallible principle of corporate law, all the obligations and responsibilities of the corporate petitioner remained unaffected as a result of the sale.

These inconsistent assertions, without clarifying evidence, draw a negative inference. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel, also, observed that changes in corporate ownership do not affect its legal status. To the contrary, new owners may have purchased the petitioning corporation. The proceedings are devoid both of their name (the unknowns), as a successor-in-interest of the petitioning corporation, Vipex Corporation. No document shows how the unknowns qualify as a successor-in-interest. This status requires documentary evidence that the unknowns have assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is

a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The petitioner submitted no later financial documents or tax return with the appeal, filed March 27, 2002. In order to maintain the priority date, the successor-in-interest must support the ongoing ability to pay the proffered wage. If no change of ownership occurred, the authorities require that the petitioner demonstrate the ability to pay continuing until the beneficiary obtains lawful permanent residence. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of continuing eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Instead, counsel asserts that the priority date is December 17, 1999 and that a prior, unrelated AAO case holds that, if the petitioner shows the ability to pay the proffered wage at that date, AAO may not deny the I-140 based on the ability to pay the proffered wage. All of these points are wrong. The priority date is January 6, 2000. The petitioner and nameless successor have presented no evidence at all as to the ability of either to pay the proffered wage in 2000. Finally, counsel refers to an AAO decision concerning the issue, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel specifically argues that CIS must consider the gross revenue and "net cumulative retained earnings," and cites *Chi-Feng Chang v. Thornburgh, supra.* This citation, and others, contradict counsel's proposition. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

After a review of the 1999 federal tax return, Forms 941, Forms W-2, the immigration and employment status of the beneficiary after April 10, 2000, and briefs, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The director concluded that the petitioner's evidence was conflicting as to why the beneficiary had not received wages as an employee in H status before April 10, 2000. The record contained no I-129 for H status, as the RFE

exacted. Counsel suggested that the director had overlooked CPAs' explanations that the beneficiary's compensation was divided between salary and officer's compensation. The proceedings, as constituted, contain no such expert opinion of a CPA.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.